

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	AWA Docket No. 09-0084
)	
KARL MITCHELL, an individual; and)	
BIG CAT ENCOUNTERS, a Nevada)	
Corporation)	
Respondents)	DECISION AND ORDER

This is an administrative disciplinary proceeding initiated by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"), that alleges Respondents violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; "the Act"), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; "Regulations and Standards"). On April 6-8, 2010, I conducted an oral hearing in Las Vegas, Nevada at which transcribed testimony was taken. APHIS was represented by its attorney, Colleen A. Carroll, Office of the General Counsel, Washington D.C. Respondents participated *pro se*. At the conclusion of the hearing, I set a schedule for the filing of proposed findings and conclusions with supporting arguments. Upon consideration of the record evidence, the arguments and explanations of the parties, and controlling law, it is found for the reasons that follow, Respondents have violated the Act and the Regulations and Standards by exhibiting tigers for compensation without a requisite license; exhibiting these tigers to the public without sufficient space and barriers between the animals and the viewing public; and by refusing to allow their facilities,

records and animals to be examined by inspectors employed by APHIS. Moreover, Respondent Karl Mitchell has knowingly failed to obey two cease and desist orders previously entered against him by the Secretary of Agriculture. I have concluded that Respondents should be made subject to cease and desist orders and assessed a civil penalty, jointly and severally, of \$50,625.00. I have further concluded that Respondent Karl Mitchell, individually, should be assessed an additional \$18,000.00 penalty for his knowing failure to obey, on twelve occasions, the provisions of the cease and desist orders entered against him.

Findings of Fact

1. Respondent Big Cat Encounters is a Nevada, non-profit corporation. Its registered agent is Legal Forms Depot/Lance Kreigh, 1161 South Loop Road A-4, Pahrump, Nevada 89048. Its business address is Post Office Box 1085, Pahrump, Nevada 89048.
2. Respondent Karl Mitchell is an individual whose mailing address is Post Office 1085, Pahrump, Nevada 89041. Respondent Karl Mitchell has always been an officer of Respondent Big Cat Encounters. Since November 18, 2009, Respondent Karl Mitchell has held all of the offices of Big Cat Encounters, and is its sole director. Respondent Karl Mitchell held AWA license number 88-C-0076 until October 7, 2001, when an order of the Secretary of Agriculture revoking the license became effective.
3. Respondents jointly operate a moderate-size business that owns exotic animals. The business purports to be a non-profit animal rescue shelter

and, for that reason, Respondents contend their operations are exempt from the licensing, handling and inspection requirements of the Act and the Regulations and Standards.

4. Respondent Karl Mitchell was the subject of the following prior adjudicative decisions by the Secretary of Agriculture respecting violations of the Act and the Regulations and Standards:
 - a. *In re Karl Mitchell d/b/a All Acting Animals*, 57 Agric. Dec. 972 (1998). In this decision and order, issued in 1998, Mr. Mitchell was assessed a civil penalty of \$750 and made subject to a cease and desist order.
 - b. *In re Karl Mitchell, an individual; and All Acting Animals, a sole proprietorship or unincorporated association*, 60 Agric. Dec. 91 (2001). In this second decision and order, issued in 2001, Mr. Mitchell was assessed a civil penalty of \$16,775, made subject to a second cease and desist order, and had his AWA license revoked. The license revocation became effective on October 7, 2001, sixty days after Mr. Mitchell was served with a copy of the order.
5. On April 17, 2004, February 1, 2008, February 2, 2008 and August 22, 2009, Respondents exhibited one or more tigers to the public for compensation by requiring "donations" from persons who were either photographed with the tigers, or were allowed to pet, touch or otherwise be in close proximity to the tigers that were not separated from the public by barriers. In 2009, Respondent Karl Mitchell was engaged as the trainer

of a tiger that he brought to the set of the Paris Hilton reality show where, in June of 2009, it was filmed while being petted by various cast members. These exhibitions took place without sufficient distance and/or barriers between the tigers and the general viewing public so as to assure the safety of the animals and the public.

6. On May 4, 2004 and March 6, 2008, Respondents denied APHIS inspectors access to inspect the facilities, records and animals at a zoo operated by Respondents at which live animals were kept for public exhibition,
7. On July 6, 2007, the Nye County Animal Shelter/Control, Pahrump, Nevada investigated a report of a dead lion in a trailer on the rear of property owned by Sandy Allman, 4210 Jesse, Pahrump, Nevada. At the time of the report and the investigation, Ms. Allman was deceased, and the report noted that her boyfriend, Respondent Karl Mitchell, was in prison. The Nye County agency concluded there was no case "with which this department can move forward...." (CX-2, at 1). Mr. Mitchell has denied any knowledge of the presence of the lion on Ms. Allman's property. The record lacks proof that Respondents failed to provide the lion adequate veterinary care, food, water, and housing while it was alive as Complainant alleged in its Second Amended Complaint.

Conclusions

1. On April 17, 2004, February 1, 2008, February 2, 2008, a day in June, 2009, and on August 22, 2009, Respondents exhibited one or more tigers

to the public for compensation without holding a valid license as required by the Act and section 2.1 of the Regulations and Standards (7 U.S.C. § 2132 (h) and 2133; 9 C.F.R. § 2.1(a)).

2. On April 17, 2004, February 1, 2008, February 2, 2008, a day in June, 2009, and on August 22, 2009, Respondents exhibited one or more tigers to the public for compensation in such manner as to violate the Act and the Regulations and Standards for handling exotic animals (7 U.S.C. § 2143; 9 C.F.R. § 1.1 and § 2.131(c)(1)).
3. On May 4, 2004 and March 6, 2008, Respondents denied APHIS inspectors access to inspect the facilities, records and animals at a zoo where it kept animals for public exhibition in violation of the Act and the Regulations and Standards (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).
4. A cease and desist order should be entered against each Respondent to deter them from future violations of the Act and the Regulations and Standards.
5. Civil penalties in the total amount of \$50,625.00 should be assessed, jointly and severally, against the Respondents for their violations of the Act and the Regulations and Standards.
6. On each the twelve occasions set forth in Conclusions 1, 2 and 3, supra, Respondent Karl Mitchell knowingly failed to obey the cease and desist orders entered against him by the Secretary of Agriculture under section 2149(b) of the Act, and additional civil penalties in the total amount of

\$18,000.00 should therefore be assessed against Respondent Karl Mitchell individually.

Discussion

A. The Violations

After his APHIS license was revoked, Respondent Karl Mitchell continued to operate as an exhibitor. He has done so both as an individual and through Big Cat Encounters, the non-profit corporation he formed in an effort to exempt his activities from governmental regulation. But his activities are not exempt. Just as before, he is a trainer of lions, tigers and other exotic animals that he and the corporation he formed exhibit to the public for compensation.

The meaning of "Exhibitor" is specifically defined in the Act:

The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals for profit or not;...

7 U.S.C. § 2132 (h)

The Regulations and Standards reiterate this definition:

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not....

9 C.F.R. § 1.1

The Regulations and Standards clarify that a lion or tiger is an "exotic animal" that is within the ambit of the Regulations and Standards:

Exotic animal means any animal not identified in the definition of “animal” provided in this part that is native to a foreign country or of foreign origin or character, is not native to the United States, or was introduced from abroad. This term specifically includes animals such as, but not limited to, lions, tigers, leopards....

9 C.F.R. § 1.1

The term “Zoo” is also defined in the Regulations and Standards:

Zoo means any park, building, cage, enclosure, or other structure or premise in which a live animal or animals are kept for public exhibition or viewing, regardless of compensation.

9 C.F.R. § 1.1

Exhibitors require valid, current licenses issued by the Secretary of Agriculture (7 U.S.C. §§ 2133, 2134; 9 C.F.R. § 2.1).

They are also required to comply with the Regulations and Standards for the handling of animals that have been promulgated by the Secretary of Agriculture (7 U.S.C. §§ 2142, 2143, 2151; 9 C.F.R. § 2.100).

Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the Regulations and Standards are being followed (7 U.S.C. §§ 2142, 2143, 2143 (a)(1) and (2), 2146 (a)).

Respondents did not have a license on each of five occasions (April 17, 2004, February 1, 2008, February 2, 2008, a day in June, 2009, and on August 22, 2009) when they exhibited one or more tigers to the public for compensation.

In addition, on each of those occasions, they did not comply with the regulation that applies to the handling of animals when exhibited to the public. Specifically:

During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient barriers between the animal and the general viewing public so as to assure the safety of the animals and the public.

9 C.F.R. § 2.131 (c)(1)

The care to be taken when handling lions, tigers and other “exotic animals” or “big cats” at public exhibitions has been the subject of a number of decisions issued on behalf of the Secretary of Agriculture. Under those decisions, Respondents did not observe the procedures that the cited regulation requires for the handling of tigers when it exhibited tigers to the public for compensation on April 17, 2004, February 1, 2008, February 2, 2008, a day in June, 2009, and on August 22, 2009. Witnesses testified and photographs were received in evidence that show, on each of those occasions, although Karl Mitchell held the exhibited tiger and it was tethered, it was not separated by distance and/or a barrier from members of the public. In fact, various persons were permitted to pet or otherwise come in close contact with the exhibited tiger; and, in response to Respondents’ invitations, some people had their photographs taken, for a fee, touching or next to the exhibited tiger.

The facts of *In re: The International Siberian Tiger Foundation, et al.*, 2002 WL 234001 (2002), illustrate the dangers of allowing members of the public to come in close proximity to tigers without the presence of physical barriers, even when tigers are declawed, chained, and ostensibly controlled by not one, but by two trainers. Person after person was bitten, with one person requiring 50 stitches. These facts were reviewed against the objectives of the Act and the pertinent regulation (9 C.F.R. § 2.131), and the decision concluded:

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure that they are provided humane care and treatment (7 U.S.C. § 2131). The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling of animals by (7 U.S.C. §§ 2143(a), 2151). The Regulations deal almost exclusively with the care and treatment of animals.

However, section 2.131 (b)(1) also provides that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public.

Animals that attack or harm members of the public are at risk of being harmed. The record establishes that effective methods of extricating people from the grip of an animal can cause the animal harm and can cause the animal's death... Even after an animal attacks a person, the animal is at risk of being harmed for revenge or for public safety reasons.... (In the latter respect, a) tiger that attacked a small girl was confiscated by the health department and decapitated to test it for rabies. Thus section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131 (b)(1)), which requires that, during public exhibition, animals be handled so there is minimal risk of harm to the public, with sufficient distance or barriers between the animals and the general viewing public so as to assure the safety of the public, is directly related to the humane care and treatment of animals and within the authority granted to the Secretary of Agriculture.

Supra

In *Antle v. Johanns*, 2007 WL 5209982, *aff'd* 264 Fed. App'x 271 (4th Cir. 2008).

The United States District for the District of South Carolina dismissed an action to set aside a Department of Agriculture decision that interpreted the cited handling regulation (9 C.F.R. § 2.131) to be violated when persons who are to be photographed with a big cat are allowed to stand behind it without any barrier between them. The Court upheld the Department's interpretation of its regulation on the grounds that it was entitled to deference and controlling weight.

Respondents further violated the Act and the Regulations and Standards on the two occasions when they refused to allow APHIS inspectors to inspect their facilities, records and animals at Mr. Mitchell's ranch in Pahrump, Nevada. The brochures circulated by Respondents to the public encouraged them to tour Mr. Mitchell's ranch and have their picture taken with a Bengal tiger for a fee of \$150, or for \$250, if in addition to the tour and photograph, they chose to attend a lecture. (CX-6). This activity meets the definition of "zoo" set forth in 9 C.F.R. §1.1, *supra* (*In Re:*

Petersen, 53 Agric. Dec. 80, 84-85 (1994). Therefore, when the APHIS inspectors came to the ranch, Respondents were required to provide them access to the facilities, records and animals, and Respondents violated the Act and the Regulations and Standards when they did not.

APHIS further argues that Respondents were exhibiting animals without a license, in violation of the Act and the Regulations and Standards, on every day of the 1,956 days that they may have operated as exhibitors during the period of April 14, 2004 through August 22, 2009. APHIS would thus assess civil penalties against Respondents for exhibiting animals without a license on the basis of 1,956 separate violations. Though Respondents' brochures and copies of their website for the ranch have been received in evidence, there was no evidence that the ranch was open to the public on every day of the 1,956 days, or that any member of the public ever accepted Respondents' invitation to tour it, be photographed with tigers, and/or attend a lecture. Consequently, the record evidence lacks proof supporting the premise that animal exhibitions took place at the ranch on any, let alone all, of the 1,956 days.

There is also an absence of evidence showing Respondents violated the Act and the Regulations and Standards by failing to provide food, water and needed veterinary care for the dead lion found in a trailer on the rear of property owned by Sandy Allman. The dead lion was found sometime after Ms. Allman had died. Ms. Allman owned animals of her own. There is no proof the Respondents knew of the lion's presence on the property. There is no proof that Respondents owned it. There is no proof that Respondents had a legal obligation to provide food, water or veterinary care to the lion,

or that they denied it needed food, water or veterinary care. Accordingly, these charges asserted by Complainant are dismissed.

B. Cease and Desist Order and Civil Penalties

Respondents are jointly responsible for violating the Act and the Regulations and Standards on each occasion when they were found to have exhibited exotic animals without a license, and when, on each of those occasions, the animals were handled in violation of the requirement of 9 C.F.R. § 2.131 (c)(1) for sufficient distance and barriers between exhibited animals and the general viewing public so as to assure the safety of the animals and the public. Respondents also jointly violated the Act and the Regulations and Standards on the two occasions when they denied APHIS inspectors access to inspect the facilities, records and animals they maintained at Mr. Mitchell's ranch.

In an effort to deter future violations, a cease and desist order is being entered for a third time against Mr. Mitchell that shall also be applicable, for the first time, to Respondent Big Cat Encounters.

Under 7 U.S.C. § 2149(b), those who violate any provision of the Act or the Regulations and Standards may be assessed a civil penalty for each violation. The maximum civil penalty that may be assessed for each violation was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a \$2,500 maximum, between April 14, 2004 and June 17, 2008 the maximum for each violation was \$3,750. In addition, 7 U.S.C. § 2149(b), was itself

amended and, effective June 18, 2008, the maximum civil penalty for each violation has been increased to \$10,000.

In addition to these violations by both Respondents, Respondent Karl Mitchell violated the two cease and desist orders previously issued against him.

The brief filed by Complainant's counsel states that the maximum amount for a civil penalty under 7 U.S.C. § 2149(b) that applies to each offense by any person who knowingly fails to obey a cease and desist order made by the Secretary, has also been raised from \$1,500 to \$1,650. However, the latest edition of Westlaw that shows the maximum amount of a civil penalty for other violations to have been increased to \$10,000, effective June 18, 2008, continues to show \$1,500 as the maximum amount for a knowing failure to obey a cease and desist order. For that reason, \$1,500 has been concluded to be the maximum amount that may be assessed in this proceeding for each time Karl Mitchell knowingly failed to obey the cease and desist orders.

In assessing civil penalties against Respondents for their joint violations of the Act and the Regulations and Standards, 7 U.S.C. § 2149(b) directs that:

...The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

In the instant proceeding, the Respondents' business is of moderate size.

In light of the previous proceedings against Karl Mitchell that resulted in the issuance of cease and desist orders, civil penalties, and the revocation of his license to exhibit animals, there is a history of previous violations and this fact demonstrates an absence of good faith.

The only other variable to be considered is the gravity of each violation. As stated in *In re: Otto Berosini*, 54 Agric. Dec. 886 (1995):

...The licensing requirements of the Act are at the center of this remedial legislation. Respondent's violation, continuing to operate without a license, with full knowledge of the licensing requirements, strikes at the heart of the regulatory program. *In re Mary Bradshaw*, 50 Agric. Dec. 499, 509 (1991); see also *In re Rosa Lee Ennes*, 45 Agric. Dec. 540, 546 (1986).

Accordingly, the maximum civil penalty should be imposed for each occasion that Respondents are known to have exhibited animals for compensation while unlicensed. The three violations that took place on April 17, 2004, February 1, 2008 and February 2, 2008, are therefore assessed civil penalties of \$3,750 each. A civil penalty of \$10,000 is being assessed in respect to each of the violations that took place on a day in June, 2009 and on August 22, 2009. The total for these violations of exhibiting animals for compensation without a license is \$31,250.

Though violating the regulation respecting the handling of exhibited animals set forth in 9 C.F.R. § 2.131 (c)(1) is a serious violation, fortunately no one was injured. For this reason, I am assessing one-half of the maximum, applicable civil penalty for each handling violation that also occurred on those occasions. The penalties assessed for the handling violations total \$15,625.

Denying APHIS inspectors access to inspect Respondents' facilities, records and animals, also violates a critical aspect of the need under the Act to monitor an exhibitor's compliance. Again however, there is no evidence of mistreatment of animals and, for this reason, the two violations that occurred when the maximum civil penalty was \$3,750, shall be assessed at one-half that amount for each of those violations, or a total of \$3,750.

Civil penalties are therefore being assessed against Respondents jointly and severally for their violations of the Act and the Regulations and Standards in the total amount of \$50,625.

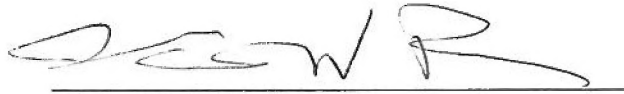
Lastly, Respondent Karl Mitchell knowingly failed to obey cease and desist orders made by the Secretary of Agriculture under the Act on each of the 12 occasions when he violated the Act and the Regulations and Standards. Under these circumstances the maximum civil penalties should apply. They have been calculated at \$1,500 per offense for a total of \$18,000, and that amount is being separately assessed against Mr. Mitchell, individually.

ORDER

1. Respondents, their agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulation and Standards issued pursuant to the Animal Welfare Act.
2. Respondents are assessed, jointly and severally, civil penalties of \$50,625, to be paid by certified check made payable to the Treasurer of the United States of America.
3. Respondent Karl Mitchell, individually, is further assessed civil penalties of \$18,000 for his knowing failures to obey cease and desist orders made by the Secretary of Agriculture under the Act.
4. This Decision and Order shall become effective and final 35 days from its service upon the parties who have a right to file an appeal with the Judicial Officer within

30 days after receiving service of the Decision and Order by the Hearing Clerk as provided in the Rules of Practice (7 C.F.R. §1.145).

Dated: August 4, 2010

A handwritten signature in black ink, appearing to read "V. W. Palmer", written over a horizontal line.

Victor W. Palmer
Administrative Law Judge